No. 1073

FEB 17 1967

JOHN F. DAVIS, CLERK

In the Supreme Court

of the

United States

October Term 1966

LAURENCE COLBRESE, JR.,

Petitioner,

vs.

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,

Respondent.

Supplemental or Reply Brief of Petitioner

CALE CROWLEY
Billings, Montana
Attorney for Petitioner

Of Counsel:

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER
Billings, Montana

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October Term 1966

LAURENCE COLBRESE, JR.,

Petitioner,

vs.

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,

Respondent.

Supplemental or Reply Brief of Petitioner

The sole legal issue is whether or not the opinion of the Ninth Circuit Court reported below at *368 F.2d 405* is in conflict with the prior controlling decision of the Montana Supreme Court in *Safeco Insurance Company v. Northwestern Mutual Insurance Company, 1963, 382 P.2d 174, 142 Mont. 155,* interpreting *Section 53-109, R.C.M. 1947.*

SUBSEQUENT LITIGATION IN STATE DISTRICT COURT IN YELLOWSTONE COUNTY, MONTANA, BETWEEN SAME PARTIES, INVOLVING SAME IDENTICAL FACTS, LEGAL ISSUES, AND SAME INSURANCE CONTRACTS.

Attached to this supplemental brief as Appendix C is a copy of the complaint *(Appendix C, pp. 1-4)*, the answer *(Appendix C, pp. 5-8)*, the pretrial order *(Appendix C, pp. 9-19)*, a stipulation *(Appendix C, 20-22)*, the motion for summary judgment *(Appendix C, p. 23)*, and the order and memorandum of the State District Judge for the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone *(Appendix C, pp. 24-25)*. This was a separate action in the State District Court between the same parties, involving a separate facet of coverage from the liability coverage that was involved in the opinion below of the Ninth Circuit Court. Otherwise the issues and facts are identical. It will be noted that the same basic legal issues are involved *(Appendix C, pp. 9-19)*; that all facts are identical, and that there was furnished to the State District Judge the opinion of the Ninth Circuit Court, below, as well as the findings of fact, conclusions of law and discussion by District Judge Jameson in the action below *(Appendix C, p. 21)*. The Montana State District Judge refused to adopt the conclusions reached by the Ninth Circuit Court, and held that irrespective of of other considerations which would ordinarily determine

the issue of ownership of a motor vehicle, the requirements of *Section 53-109(d), R.C.M. 1947* for transfer of motor vehicles are conclusive:

> "in view of the explicit holding of the Montana Supreme Court",

citing the holding of the Montana Supreme Court in the *Safeco* case *(Appendix C, pp. 24-25)*.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The findings of fact controlling this case are found at pages 2-10 of Appendix A, Petition for Writ. In an effort to ascertain the basis of the *Safeco* opinion, United States District Judge W. J. Jameson procured from the Montana Supreme Court all of the appellate briefs which had been submitted to and considered by the Montana court in that *Safeco* case *(227 F. Supp. 978 at 981)*. Despite many fact differences between the two cases, he found the two cases identical with regard to the controlling fact required by *Section 53-109, R.C.M. 1947*, as a condition precedent to validity of transfer of ownership of a motor vehicle for any purpose. In neither this case nor the *Safeco* case did they transfer or execute the certificate of title over to the transferee, nor deliver it to the transferee, nor endorse it for any purpose, nor was any new certificate of title ever issued by the Registrar of Motor Vehicles. Under *Section 53-109(d)* as interpreted in the *Safeco case*, the intended transfer was void for any purpose from its inception *(227 F. Supp. at 981-*

982). Petitioner has set out the five controlling facts in which petitioner believes that the facts of *Safeco* are identical with the facts of this case *(Petition for Writ, page 16).* Judge Jameson weighed the statements by the Montana Supreme Court in its reported opinion in light of the arguments and authorities which had been submitted to the Montana court in the appellate briefs, and, from that comparison, had a clear, clean-cut picture of the Montana law applicable to the undisputed facts of this case. Petitioner has now submitted to this court in Appendix B of the Petition for Writ filed in ths case the meat and substance of those arguments and authorities that were submitted to the Montana Supreme Court in the appellate briefs in *Safeco,* and which were studied by District Judge Jameson in this case. We are sorry that the Ninth Circuit Court did not have the benfit of the same material. We think it will enlighten this Court to have it.

Respondent criticizes examination of the appellate briefs submitted to the Montana Supreme Court in *Safeco* to ascertain the basis of the Montana law applicable to the undisputed and controlling facts of this case. The veracity of the material in Appendix B is not challenged by respondent, nor the conclusions to be drawn therefrom, and respondent simply urges that the lower courts are not required to go outside the reported opinions and examine material outside of those opinions in order to

ascertain the scope and extent of the Montana law applicable under the facts of this case. This Court has stated on numerous occasions that it is the duty of the federal appellate courts as well as the trial courts to *ascertain and apply* the state law where it controls the decision.

Huddleston v. Dwyer, 322 U.S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015;

Meredith v. City of Winter Haven, 320 U.S. 228, 88 L. Ed. 9, 64 S. Ct. 7;

Fidelity Union Trust Company v. Field, 311 U.S. 169, 85 L. Ed. 109, 61 S. Ct. 176;

West v. American Telephone & Telegraph Company, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

The Ninth Circuit Court itself said in *Summers v. Wallace Hospital, 1960, 9th C.C., 276 F. 2d 831:*

> "* * * As stated in West v. American Telephone & Telegraph Co., 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139, *it is our duty to ascertain from all available data* what the state law is and apply it rather than to prescribe a different rule, however superior such rule may appear from the viewpoint of 'general law'. Whatever sources and processes the courts of Idaho would examine or employ in deciding this question in the first instance ought to be examined and employed by us here."
>
> *(P. 833; Emphasis supplied.)*

Petitioner cannot conceive of a more logical source of available data to procure and examine in an effort to ascertain the legal basis of a reported opinion of a state supreme court than the appellate briefs that were submitted to and considered by that court. Petitioner suggests that it was not only proper for District Judge Jame-

son to procure and study and weigh the appellate briefs that had been submitted to the Montana Supreme Court in *Safeco*, but that in order to examine all available data, and in order to ascertain and apply the correct Montana law to the fact situation in this case, he was compelled to do so. We think that the Ninth Circuit Court should have done so. We think that when this Court has done so, the comparison between the arguments and authorities that were submitted in appellate briefs to the Montana Supreme Court in *Safeco*, and the statements subsequently made by the Montana Supreme Court in its decision in answer to those arguments, will reveal the basis of the Montana law applicable to the undisputed facts in this case in its true perspective. It is manifestly clear from such examination and comparison that there is a direct conflict on the same controlling facts between the opinion of the Ninth Circuit Court reported below, and the prior controlling decision of the Montana Supreme Court in *Safeco*.

Respondent likewise places great emphasis on dicta in an early opinion of United States District Judge Charles N. Pray in *Fireman's Insurance Company of Newark, New Jersey v. Show, 1953, D.C. Mont., 110 F. Supp. 523*, decided ten years before the opinion of the Montana Supreme Court in *Safeco*. Respondent criticizes petitioner for not citing and discussing that early decision in our petition in this case. The most cogent argument for not doing so is set forth clearly and suc-

cinctly in the original opinion in this case by District Judge Jameson *(227 F. Supp. 978 at 981)*, which states:

> "Defendant argues that the opinion of Judge Pray in Fireman's Ins. Co. of Newark, N.J. v. Show, 1953, D. Mont., 110 F. Supp. 523, is 'most persuasive' in determining the effect of section 53-109(d). In their pretrial memorandum counsel recognized that Safeco Insurance Co. is in 'apparent conflict with Judge Pray's decision'; but in their brief in support of defendant's motion for summary judgment, it is contended that the conflict is only on the face of the decisions and that 'an examination of the rationale behind the decisions does not really involve any conflict.'
>
> "Respondent in Safeco likewise relied upon Judge Pray's opinion, and it was discussed in the briefs of both counsel in that case. Yet no reference was made to this case in the opinion of the Montana court in Safeco. In the absence of a subsequent construction of the statute by the Montana Supreme Court, I might properly follow Judge Pray's decision. I am of course now bound by the construction of the Montana Court in Safeco, unless it is determined that Safeco does not govern the situation here."
>
> *(P. 981.)*

We respectfully submit that examination of the arguments and authorities submitted to the Montana Supreme Court in the appellate briefs in *Safeco* is proper, that the disposition of those arguments by the Montana Court in its reported opinion affords a clean-cut picture of the correct Montana law applicable in this case, and a comparison with the Ninth Circuit Court opinion reported below reveals an irreconcilable conflict between the two opinions.

Respectfully submitted,

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Petitioner

OF COUNSEL:

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER
Billings, Montana

IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA IN AND FOR
THE COUNTY OF YELLOWSTONE

LAURENCE COLBRESE, JR.,

Plaintiff,

-vs-

No. 41476

NATIONAL FARMERS UNION
PROPERTY AND CASUALTY
COMPANY,

Defendant.

APPENDIX

Complaint filed April 10, 1963.

Plaintiff, for cause of action, alleges:

I.

That Duaine Colbrese, deceased, was a child, who at the time of his death on December 3, 1960, was 16 years of age; that plaintiff is the father of said Duaine Colbrese, deceased.

II.

That on December 3, 1960, at about 8:00 o'clock A.M., of said day, Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by defendant, Jerry Kinney, the son of Albert Kinney, upon and along U. S. Highway 10S,

Respectfully submitted,

GALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Petitioner

F COUNSEL:

ROWLEY, KILBOURNE, HAUGHEY
ANSON & GALLAGHER
Billings, Montana

APPENDIX

APPENDIX C

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

LAURENCE COLBRESE, JR., Plaintiff, -vs- NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY, Defendant.	)	No. 41476

Complaint filed April 10, 1963.

Plaintiff, for cause of action, alleges:

I.

That Duaine Colbrese, deceased, was a child, who at the time of his death on December 3, 1960, was 16 years of age; that plaintiff is the father of said Duaine Colbrese, deceased.

II.

That on December 3, 1960, at about 8:00 o'clock A.M., of said day, Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by defendant, Jerry Kinney, the son of Albert Kinney, upon and along U. S. Highway #10,

a public highway running generally in an east-west direction across the State of Montana, at a point on such highway approximately 1 mile east of the town of Reed Point, Montana, whereat the said Jerry Kinney operated, managed and controlled the automobile in such a manner that it skidded on ice then and there existing, left the highway, upset and thereby caused injuries to the person of Duaine Colbrese which resulted in his death.

III.

That at all times involved herein, said 1949 Ford two-door sedan, motor and serial No. 69672, was not owned by Jerry Kinney or by Albert Kinney but was owned by the devisee of or by the administratrix with the will annexed of Charles W. Ehart, deceased, and was not regularly furnished for the use of Jerry Kinney, son of Albert Kinney.

IV.

That plaintiff was forced to incur funeral, casket, and cemetery expenses, because of the death of Duaine Colbrese, in the sum of Eight Hundred Fifty and no/100 ($850.00) Dollars.

V.

That at all times mentioned herein, there was in full force and effect a certain policy of automobile liability insurance numbered A24-107,394 issued by defendant National Farmers Union Property and Casualty Co. to Albert Kinney on a 1951 Dodge vehicle, providing under "Coverage F" of said policy, as follows:

"COVERAGE F — Medical Payments
"To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including eye glasses and prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

"DIVISION 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck by an automobile;

"DIVISION 2. To or for any other person who sustains bodily injury, caused by accident, while occupying:

"(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or

"(b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant or (2) its operation or occupancy by a relative and it is a private passenger automobile or trailer not regularly furnished for the use of such relative."

VI.

That by virtue of said "Coverage F", defendant owes plaintiff the sum of Eight Hundred Fifty and no/100 Dollars ($850.00), none of which has been paid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of $850.00, for his costs of suit and for such other and further relief as to the Court seems proper.

LAMEY, CROWLEY, KILBOURNE,
HAUGHEY & HANSON

By LOUIS R. MOORE
Attorneys for Plaintiff

STATE OF MONTANA)
) ss.
County of Yellowstone)

LAURENCE COLBRESE, JR., being first duly sworn, deposes and says:

That he is the plaintiff named in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those matters stated on information and belief, and as to those he believes them to be true.

LAURENCE COLBRESE, JR.

Subscribed and sworn to before me this 9th day of April, 1963.

LOUIS R. MOORE
Notary Public for State of Montana.
Residing at Billings, Montana.
My commission expires June 24, 1963.

(NOTARIAL SEAL)

Answer and Demand for Jury Trial filed September 25, 1963.

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. Defendant answers plaintiff's complaint as follows:

3. Admits the allegations of Paragraph II of the complaint.

4. Denies the allegations of Paragraph III of the complaint.

5. Defendant is without knowledge or information upon which to form a belief as to the truth of the allegations of Paragraph IV of the complaint.

6. Admits the allegations of Paragraph V; allege that said policy of insurance further provided,

"EXCLUSIONS

This policy does not apply under (medical payments coverage) to bodily injury:

* * *

(c) To any person other than the named insured or relative, resulting from use of (1) a non-owned automobile in the automobile business or as a public or livery conveyance, or (2) a non-owned automobile in any other business or occupation except operation or occupancy of a private passenger automobile by the named insured or by his private chauffeur or domestic servant, or of a trailer used therewith."

7. Denies the allegations of Paragraph VI of the complaint.

8. Denies generally each and every other allegation in said complaint contained not hereinbefore specifically admitted, qualified or denied.

THIRD DEFENSE

9. On or about September 2, 1958, and at all times subsequent thereto to December 3, 1960, Albert Kinney represented to defendant, in writing, and otherwise, that he was the owner of the said 1949 2 Door Ford Sedan described in paragraph III of the complaint; when defendant issued policy No. A24-107,394, described in paragraph V of the complaint, it did so with the understanding and representation from Albert Kinney that he was the owner of said 1949 Ford automobile; that at all times said 1949 Ford automobile was in the possession of Albert Kinney, subject to his control; that defendant under its underwriting rules, would not have issued its policy of insurance described in paragraph V of the complaint, if in fact the said Albert Kinney was not the owner thereof, or had not represented himself to be the owner thereof, particularly on December 3, 1960.

FOURTH DEFENSE

10. That on September 2, 1958, and at all times subsequent thereto, to and including December 3, 1960, Albert Kinney represented to the defendant that he was the owner of said automobile, in writing and otherwise; plaintiff claims herein under and by virtue of the rights of Albert Kinney under said policy; Albert Kinney and

plaintiff waived any rights to claim against the defendant under said policy arising out of the use of the said 1949 Ford automobile on December 3, 1960, and are estopped from claiming against this defendant on the ground that Albert Kinney was not the owner of said 1949 Ford automobile.

FIFTH DEFENSE

11. The amount of money prayed for in this suit is for funeral, casket and cemetery expenses incurred because of the death of Duaine Colbrese; said expenses were the subject of a suit brought by plaintiff against Jerry Kinney in Cause No. 3650, in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater; judgment for the sum of $18,850.00, including the sum of $850 for such funeral, casket and cemetery expenses was entered in favor of the plaintiff and against defendant Jerry Kinney, through his guardian Albert Kinney, in said cause; said judgment has been satisfied of record.

SIXTH DEFENSE

12. The sum of $850, representing expenses for funeral, casket and cemetery bills incurred by plaintiff as alleged in the complaint is the subject of a suit now pending in Civil No. 438, in the District Court of the United States, for the District of Montana, Billings Division, between these same parties.

WHEREFORE, defendant prays that plaintiff take

nothing by his complaint herein and that it be given costs of suit and such other and further relief as may be meet in the premises.

DEMAND FOR JURY TRIAL

Defendant demands a jury trial in the above entitled action.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY

By JOHN C. SHEEHY
403 Electric Building
Billings, Montana
Attorneys for Defendant

Service of the within and foregoing Answer and Demand for jury trial and receipt of true copy thereof, made and admitted this 25th day of September, 1963.

LAMEY, CROWLEY, KILBOURNE,
HAUGHEY & HANSON

By LOUIS R. MOORE
Attorneys for Plaintiff

Pretrial Order filed November 14, 1963.

Pursuant to Rule 16 of the Montana Rules of Civil Procedure, a pretrial conference was held in the above entitled cause on the 8th day of November, 1963, at 10:00 o'clock A.M. Louis R. Moore of the firm of Lamey, Crowley, Kilbourne, Haughey, & Hanson, Billings. Montana, representing the plaintiff. John C. Sheehy of the law firm of Wiggenhorn, Hutton, Schiltz & Sheehy, Billings, Montana, representing the defendant.

AGREED FACTS

The following facts are admitted, agreed to be true, and require no proof:

1. That Duaine Colbrese, deceased, was a child, who at the time of his death on December 3, 1960, was 16 years of age; that plaintiff is the father of said Duaine Colbrese, deceased.

2. That on December 3, 1960, at about 8:00 o'clock A.M. of said day, Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by one Jerry Kinney, the son of Albert Kinney, upon and along U. S. Highway #10, a public highway running generally in an east-west direction across the State of Montana, at a point on such highway approximately 1 mile east of the town of Reed Point, Montana, whereat the said Jerry Kinney operated, managed and controlled the automobile in such a manner that it skidded on ice then and there existing, left the

highway, upset and thereby caused injuries to the person of Duaine Colbrese which resulted in his death.

3. That plaintiff was forced to incur funeral, casket, and cemetery expenses, because of the death of Duaine Colbrese, in the sum of Eight Hundred Fifty and no/100 ($850.00) Dollars.

4. That at all times mentioned herein, there was in full force and effect a certain policy of automobile liability insurance numbered A24-107,394, issued by defendant National Farmers Union Property and Casualty Co. to Albert Kinney on a 1951 Dodge vehicle, providin under "Coverage F" of said policy, as follows:

> "COVERAGE F — Medical Payments
> "To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including eye glasses and prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:
>
> "DIVISION 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck by an automobile;
>
> "DIVISION 2. To or for any other person who sustains bodily injury, caused by accident, while occupying:
>
> "(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or
>
> "(b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the

named insured or its operation on his behalf by his private chauffeur or domestic servant or (2) its operation or occupancy by a relative and it is a private passenger automobile or trailer not regularly furnished for the use of such relative."

5. That Albert Kinney obtained a policy of insurance from defendant, numbered A24-157,138, covering the 1949 Ford two door sedan described in Paragraph IV of the complaint; that said policy of insurance was in effect from September 2, 1958, to September 2, 1960, and lapsed for non-payment of premium on September 2, 1960.

6. That title to the 1949 Ford two door sedan, motor No. 69 672, was, at all times pertinent to this action, and still is, registered in the name of C. W. Ehart.

PLAINTIFF'S CONTENTIONS

Plaintiff's contentions are as follows:

1. That defendant is liable to plaintiff under the insurance contract numbered A24-107,394, quoted in part above, under Division 2(b)(2), thereof, because its operation was by a relative of the insured, it was a private passenger automobile, and was not regularly furnished for the use of such relative.

DEFENDANT'S CONTENTIONS

Defendant's contentions are as follows:

1. That the 1949 Ford two door sedan was owned by Albert Kinney on the date of the accident.

2. That even if the Ford automobile was not owned

by Kinney on the date of the accident, it was regularly furnished for the use of Jerry Kinney, the son of Albert Kinney.

3. That on or about September 2, 1958, and at all times subsequent thereto to December 3, 1960, Albert Kinney represented to defendant, in writing and otherwise, that he was the owner of the said 1949 2 Door Ford Sedan described in paragraph III of the complaint; when defendant issued policy No. A24-107,394, described in paragraph V of the complaint, it did so with the understanding and representation from Albert Kinney that he was the owner of said 1949 Ford automobile; that at all times said 1949 Ford automobile was in the possession of Albert Kinney, subject to his control; that defendant under its underwriting rules, would not have issued its policy of insurance described in paragraph V of the complant, if in fact the said Albert Kinney was not the owner thereof, or had not represented himself to be the owner thereof, particularly on December 3, 1960.

4. That on September 2, 1958, and at all times subsequent thereto, to and including December 3, 1960, Albert Kinney represented to the defendant that he was the owner of said automobile, in writing and otherwise; plaintiff claims herein under and by virtue of the rights of Albert Kinney under said policy; Albert Kinney and plaintiff waive any rights to claim against the defendant under said policy arising out of the use of the said 1949

Ford automobile on December 3, 1960, and are estopped from claiming against this defendant on the ground that Albert Kinney was not the owner of said 1949 Ford automobile.

5. The amount of money prayed for in this suit is for funeral, casket and cemetery expenses incurred because of the death of Duaine Colbrese; said expenses were the subject of a suit brought by plaintiff against Jerry Kinney in Cause No. 3650, in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater; judgment for the sum of $18,850.00, including the sum of $850.00 for such funeral, casket and cemetery expenses was entered in favor of the plaintiff and against defendant Jerry Kinney, through his guardian Albert Kinney, in said cause; said judgment has been satisfied of record.

6. The sum of $850, representing expenses for funeral, casket and cemetery bills incurred by plaintiff as alleged in the complaint is the subject of a suit now pending in Civil No. 438, in the District Court of the United States, for the District of Montana, Billings Division, between these same parties.

ISSUES OF FACT

The following issues of fact, and no others, remain to be litigated upon the trial.

I.

Whether the 1949 Ford 2-door sedan was regularly furnished for the use of Jerry Kinney.

II.

Whether Albert Kinney represented that he was the owner of the 1949 Ford 2-door sedan when making application to defendant for insurance thereon.

III.

Whether defendant issued insurance policy No. A24-107,394 with the understanding and representation from Albert Kinney that he was the owner of the 1949 Ford 2-door sedan involved in the accident.

IV.

Whether the 1949 Ford 2-door sedan involved in the accident was at all times in the possession of Albert Kinney and under his control.

V.

Whether defendant, under its underwriting rules, would not have issued its policy of insurance numbered A24-107,394 if in fact Albert Kinney was not the owner of the 1949 Ford 2-door sedan, or had not represented himself to be the owner thereof, particularly on December 3, 1960.

VI.

Whether, on September 2, 1958, and at all times subsequent thereto, to and including December 3, 1960, Albert Kinney represented to the defendant that he was

the owner of said 1949 Ford 2-door sedan, in writing and otherwise.

VII.

Whether the judgment entered in Civil Action #3650, in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater, in the amount of $18,850.00, included the sum of $850.00 for funeral, casket and cemetery expenses.

VIII.

Whether the sum of $850.00, representing expenses for funeral, casket and cemetery bills incurred by plaintiff is the subject of the suit now pending in Civil No. 438, in the District Court of the United States, for the District of Montana, Billings Division, between these same parties.

ISSUES OF LAW

The following issues of law, and no others, remain to be litigated upon the trial:

I.

Who owned the 1949 Ford 2-door sedan involved in the accident on December 3, 1960.

II.

Was the 1949 Ford 2-door sedan involved in the accident a "non-owned" automobile under the terms of insurance policy No. A24-107,394 on December 3, 1960.

III.

Do the allegations of defendant's third defense constitute a legal defense to the complaint.

IV.

Do waiver and estoppel, as alleged in defendant's fourth defense, bar plaintiff in this action.

V.

Does the satisfaction of the judgment entered in the Stillwater County case bar plaintiff in this action.

VI.

Does the pendency of Civil Action No. 438, in the District Court of the United States, between these same parties, constitute a bar to this action.

AMENDMENTS TO PLEADINGS

The Court granted, without objection, defendant's motion to amend its answer, on line 12 of page 3 thereof, to delete the words "fully paid and".

ADDITIONAL PRETRIAL DISCOVERY

Defendant will furnish a copy of the application for insurance on policy No. A24-107,394.

STIPULATIONS

I.

The parties stipulate that the exhibit attached hereto as being the insurance policy, shall be considered as the insurance policy in effect on December 3, 1960, even though the policy period noted on the "Declarations" page thereof does not cover such date.

II.

The parties stipulate that the copies of the matters and things taken from the probate file in the estate of

C. W. Ehart (Probate No. 10181) constitute all essential matters and things from said file, and nothing has been filed in connection with the said probate since the inventory and appraisement attached hereto as an exhibit.

III.

It is stipulated and agreed by the parties that the allegations of defendant's Fifth Defense are true and in connection therewith it is also stipulated that the said Stillwater County action was not defended by defendant on behalf of Jerry Kinney; that defendant did not pay the judgment entered and that the judgment was satisfied by an "Acknowledgment of Satisfaction of Judgment" attached hereto as an exhibit.

DETERMINATION OF LEGAL QUESTIONS IN ADVANCE OF TRIAL

It was agreed that the following legal issues should be determined by the Court in advance of trial, and that each party may file one brief, which brief must be filed by Thursday, November 14, 1963.

1. Does the "Fifth Defense" on page 3 of defendant's answer constitute a defense to plaintiff's claim?

EXHIBITS

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

1. The insurance policy.
2. The funeral bill.

3. The contents of the C. W. Ehart probate file.

4. The application dated September 2, 1958, by Albert Kinney, for insurance on the 1949 Ford 2-door sedan.

5. The application for insurance which resulted in Policy No. A24-107,394.

The above exhibits will be admitted in the form attached hereto, and without objection, foundation or proof.

The following exhibits will be admitted in evidence without foundation, and in the form attached hereto, but subject to all other objectons as to relevancy, etc:

1. The complaint in Civil Action No. 438, U.S. District Court for the State of Montana, Billings Division.

2. Acknowledgment of satisfaction of the judgment in Civil Action No. 3650 in the State of Montana, in and for the County of Stillwater.

EXCHANGE OF EXHIBITS

None.

TRIAL

It is estimated that the case will require two days for trial.

The case will be tried before the court with a jury.

IT IS HEREBY ORDERED that this pre-trial order shall supersede the pleadings and govern the course of the trial of this case, unless modified to prevent manifest injustice.

IT IS HEREBY ORDERED that all pleadings herein shall be amended to conform to this pre-trial order.

Dated this 14th day of November, 1963.

E. E. FENTON
District Judge

Approved as to form and content:

LOUIS R. MOORE
Attorney for Plaintiff

JOHN C. SHEEHY
Attorney for Defendant

Stipulation filed December 9, 1966.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the following facts are admitted, agreed to be true, and will require no proof at the trial of this cause:

1. Paragraphs I, II, IV and V of the complaint.

2. That on and prior to December 3, 1960, there were in full force and effect certain policies of automobile liability insurance issue by defendant to Albert Kinney covering various vehicles owned by said Albert Kinney, to-wit:

(a) Policy A24-107, 394, covering a 1951 Dodge automobile;

(b) Policy A24-030,461 covering a 1954 International truck.

In addition, there were other policies issued by defendant to Albert Kinney and numbered A-061,819; A24-144,258 and 24R23,194, which covered vehicles unknown at this time to counsel.

3. That Albert Kinney obtained a policy of insurance from defendant, numbered A24-157,138, covering the 1949 Ford two-door sedan described in Paragraph III of the complaint; that said policy of insurance was in effect from September 2, 1958, to September 2, 1960, and lapsed for non-payment of premium on September 2, 1960.

IT IS FURTHER STIPULATED that plaintiff's admissions, as stated in the attached request therefor and answer thereto, which said admissions were filed in Civil Action #438 of the U. S. District Court for the District of Montana, Billings Division, are given and admitted in this action.

IT IS FURTHER STIPULATED that the Court shall be furnished with a copy of the decision of the NINTH CIRCUIT COURT OF APPEALS in the action entitled "National Farmers Union Property and Casualty Company vs. Laurence Colbrese, Jr.", being Cause #20,550 in such Court, and further that the Court shall be furnished with a copy of the Findings of Fact, Conclusions of Law and Discussion thereof by Judge Jameson in Civil Action #438.

IT IS FURTHER STIPULATED that the insurance policy attached to the pre-trial order herein shall be considered as being both Policy #A24-107,394 and policy #A24-030,461.

Dated this 7th day of December, 1966.

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER

By LOUIS R. MOORE
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WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY

By JOHN C. SHEEHY
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Attorneys for Defendant

Motion for Summary Judgment filed December 21, 1966.

COMES NOW the defendant named, under Rule 56 of the Montana Rules of Civil Procedure and moves the Court for a Summary Judgment in favor of the defendant as to the issue of liability of the defendant to the plaintiff in the above entitled cause.

THIS MOTION is made and based upon the pleadings, depositions, admissions and stipulations on file herein, and upon the ground that there is no genuine issue as to any material fact and that the moving party herein is entitled to judgment as a matter of law.

Dated this 20th day of December, 1966.

JOHN C. SHEEHY
Of Counsel for the Defendant,
National Farmers Union Property
and Casualty Company

DUE SERVICE ADMITTED this 20th day of December, 1966.

LOUIS R. MOORE
Of Counsel for the Plaintiff

Order and Memorandum filed February 1, 1967.

The defendant having heretofore filed its motion for summary judgment in favor of the defendant as to the issue of liability of the defendant to the plaintiff, and said motion having been submitted for decision on oral arguments and written briefs, and having been by the Court fully considered,

IT IS ORDERED, that said motion be, and it is hereby, denied.

Dated this 1st day of February, 1967.

E. E. FENTON
Judge

MEMORANDUM:

The issue here is whether the vehicle in question was or was not owned by Albert Kinney when Duaine Colbrese was fatally injured while riding as a passenger therein.

The controlling statute, Sec. 53-109(d) R.C.M. 1947, provides:

> "Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

Irrespective of the other considerations which would ordinarily determine the issue of ownership, the bare fact

that the documents specified by Sec. 53-109(d) were not issued to Albert Kinney is conclusive in view of the explicit holding of the Montana Supreme Court, that,

> "We must adhere to the tenor of our formal interpretations that *the provisions of the motor vehicle code provide the exclusive method of accomplishing a valid sale and transfer of a motor vehicle.*" (Emphasis supplied.) (Safeco Ins. Co. v. Northwestern Mutual Ins. Co., 142 Mont. 155, at 164-5, 382 P.2d 174, at 179.)

E. E. FENTON
Judge

CC: Counsel of Record.